Basin Frozen Foods, Inc. *and* Teamsters, Food Processing Employees, Public Employees, Warehousemen and Helpers Local Union No. 760, a/w Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 19–CA–21029

March 28, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND FOX

On December 5, 1995, Administrative Law Judge Michael D. Stevenson issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Basin Frozen Foods, Inc., Warden, Wyoming, its officers, agents, successors, and assigns, shall pay to Earl Lee Wheelock the sum of $20,449, with interest to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Max Hochanadel, Esq., for the General Counsel.
Nels A. Hansen, Esq., of Ephrata, Washington, for the Respondent.

SUPPLEMENTAL DECISION

MICHAEL D. STEVENSON, Administrative Law Judge. On July 20, 1992, the Board affirmed Administrative Law Judge Timothy D. Nelson's decision in the underlying case [307 NLRB 1406] (G.C. Exhs. 1(a), (b)). That decision was enforced by unpublished memorandum of the Ninth Circuit which decision issued on March 4 (G.C. Exh. 1(c)).[1]

[1] Unless otherwise specified, all dates refer to 1994.

The parties were thereafter unable to resolve their differences over the amount of backpay due and owing to discriminatee Earl Lee Wheelock as a result of the Board's Order to Respondent to make Wheelock ''whole for any loss of earnings and other benefits suffered as result of the discrimination against him.'' Accordingly on October 24, a compliance specification (G.C. Exh. 1(d)) issued, and on December 2, an amendment to compliance specification (G.C. Exh. 1(i)) issued. The latter document made certain changes in the backpay quarterly computation so that the backpay alleged to be due and owing to Wheelock was reduced from the original compliance specification of $21,844 to the figure contained in the amended document, $21,118.

On March 28, 1995, a 1-day hearing was held in Moses Lake, Washington, with respect to ascertaining the appropriate backpay owed to Wheelock. As will be reflected in the facts below, there is no issue with respect to reinstatement, and there is no issue with respect to the formula chosen by the General Counsel to compute backpay.

The parties agreed and stipulated at hearing that the relevant backpay period began on July 26, 1990, when Wheelock was terminated and ended on September 22, when Wheelock declined a proper offer of reinstatement to Respondent. (Tr. 65–66.)

Issues

1. Whether Wheelock failed to exercise reasonable diligence in seeking interim employment; and whether Wheelock was grossly negligent in losing two interim employment positions.

2. Whether Wheelock failed to report to the General Counsel certain interim earnings and whether Wheelock claimed excessive mileage deduction while working for an interim employer SRTC; and if Wheelock did either or both of the above, how is Respondent's backpay obligation affected, if at all.

3. Whether the Region properly included in the computations an employee named Warren and properly excluded another employee named Washburn.

A. *Facts*

Discriminatee Wheelock, age 51, has lived in Moses Lake for about 8 years. Prior to that, he lived in California. He has no family and supports only himself. In January 1988, Wheelock purchased a 10-acre farm in the Moses Lake area; Wheelock lives on the farm and works it as I will recite in more detail below. With the farm, Wheelock also purchased at least two pieces of farm equipment, a digger and planter.

Wheelock testified that one of his first regular jobs in the Moses Lake area—a job before his employment for Respondent—was at Flodine, a food processing machinery maker. After about a month's time, doing work as a welder and helper, Wheelock was laid off along with about 8 other employees out of the 10-person workcrew. The owner of the business, Flodine, told Wheelock that he would recall Wheelock, but that never happened. In fact, after the layoffs, company signs were removed from the business and Wheelock was under the impression that the Company had gone out of business.

Respondent's only witness, Kevin Weber, president and co-owner with other family members of Respondent, testified

that Flodine was not out of business—he had talked to its owner a few days before the hearing—but had simply relocated its business to another location. Wheelock credibly testified in rebuttal he was not aware of the relocation.

Another pre-Respondent job held by Wheelock in Moses Lake was as a motorcycle mechanic at Moses Lake Honda & Yamaha. In addition, at times other than when he worked for Moses Lake Honda & Yamaha, and including certain periods during the backpay period, Wheelock worked as a freelance motorcycle mechanic. If friends or acquaintances were able to obtain a replacement part, Wheelock would perform the repair in his shed on his farm or on the premises of an employer named, ''Ottem's Outdoor Power Equipment,'' who, according to Wheelock, gave him permission to do freelance motorcycle repairs when the business at Ottem's was slow. Wheelock estimated that over the past 4 years, he earned about $300 to $400 doing freelance motorcycle repairs. For this work Wheelock kept no records and did not report any earnings from freelance work on his tax returns. Still another pre-Respondent job held by Wheelock was at American Foods/Susspice Potato for a few weeks of part-time work. (Wheelock could not recall any additional details about this job.)

In February 1990, Wheelock went to work for Respondent, where he worked as a mechanic and welder.

After his termination on July 26, 1990, and while performing certain work on his farm, Wheelock obtained a part-time job at Ottem's repairing lawnmowers and other small motors.[2] After Wheelock lost his job as a schoolbus driver in March 1992 as I will recite below, Wheelock was offered an increase in hours at Ottem's from the several hours per week he had been working to 20 hours per week. For the hours he had been working at Ottem's as of May 1991, Wheelock received a base pay of $42.50 per week. The longer hours were paid at the rate of $4.25 per hour.

Immediately after his termination from Respondent, Wheelock registered at the Job Services of the State Unemployment Security Division and also perused the job wanted ads of the daily newspaper. In August or September 1990, Wheelock learned from word of mouth, of a job vacancy driving a schoolbus for the Moses Lake School District. Apparently this job was as a substitute busdriver for the 1990–1991 school year. During this same period, Wheelock also worked as a substitute schoolbus driver for the Warden School District. Then beginning in the 1991–1992 school year, Wheelock became a regular, full-time busdriver, in Moses Lake, working approximately 20–22 hours per week during the time school was in session. For this work, Wheelock was paid $490 per month based on a 12-month year.

Sometime in early 1991, Wheelock was accused of striking children on the schoolbus. At hearing Wheelock allowed as how he may have raised his voice on the bus to control unruly children, but he denied striking any. As soon as these allegations came to light, Wheelock was immediately suspended from his job, and after hearing some parents had gone to the police about the matter, Wheelock retained legal counsel. No charges were ever filed, however. Instead, in March 1992, Wheelock was fired by the school district. After termination, Wheelock discussed the matter with a union representative, who allegedly told Wheelock that any appeal would be a waste of time and that the Union would not represent him. Accordingly, Wheelock did not pursue the matter.

After he lost his job as a schoolbus driver, Wheelock continued to work on his farm and for Ottem's until September 1992 when he accepted an offer to return full time to Respondent as a mechanic/welder/fabricator at $6 per hour. Wheelock left this job in February 1993 to work for Carnation. All agree that Wheelock's reinstatement by Respondent at this time did not toll backpay because Wheelock was not being paid an appropriate wage. Other mechanics and fabricators at this time were making $10 per hour.

Wheelock obtained his job lead for Carnation by seeing a notice on the bulletin board at Jobs Services. According to Wheelock, Carnation is a potato processing plant making french fries. For 2 months, Wheelock worked as a potato trimmer, cutting off bad parts of the potato. Then Wheelock became a mechanic at which time his wages increased from $6.80 to $10.50 per hour. On March 1, 1994, Wheelock was fired from Carnation for violation of safety rules on two occasions and for one other reason. More precisely, in violation of Carnation's safety rules, Wheelock was repairing equipment without putting a padlock on a circuit breaker to ensure that no one could turn on the machinery while he was working on it. For this violation Wheelock was warned, then he violated the same safety rules again. Then he inspected a bearing, found it suitable, only to have it fail soon after. For these three reasons, Wheelock was fired.

Wheelock returned to the Job Services Agency and found a temporary job at Skills, Resources & Training Center (SRTC), a day labor agency. Wheelock was referred by SRTC to Stemilt in Wenatchee, Washington, a location 78 miles one way from Wheelock's farm. During May and June Wheelock worked on this job for 32 days as a welder and fabricator, making $11 per hour. In addition, Wheelock received a mileage allowance of $10 per day.

On July 1, Wheelock began working as a mechanic for Moses Lake Kawasaki, a job he continued to hold through the day of hearing and perhaps currently. According to Respondent's Exhibit 3, purporting to be a payroll register for Moses Lake Kawasaki, Wheelock earned $1296 in the second quarter and $4,044.60 in the third quarter. In the amendment to compliance specification (G.C. Exh. 1(i)), appendix B, it is alleged that Wheelock earned $5341 in the third quarter (this is the sum of the two amounts referred to above). Wheelock could not account for the discrepancy except to explain he began working for Kawasaki on July 1, the day the business opened. The Board agent who along with attorney for the Region, James Sand, performed the backpay computations in this case, speculated in his testimony that the discrepancy could be an accounting error. (Tr. 60.) No one from Kawasaki was called to testify in this case.

I turn now in conclusion of this segment to discuss Wheelock's farm activities during the backpay period. As

[2] In an application for employment dated September 25, 1992 (R. Exh. 4), which Wheelock filled out before returning temporarily to work at Respondent, Wheelock wrote that he worked at Ottem's between May 1, 1991, through September 26, 1992. In a Board form entitled, ''Claimant Expenses & Search for Work Report'' (R. Exh. 5) Wheelock wrote that he worked at Ottem's from July 1 through September 30, 1991, and was still there as of the end of the third quarter, 1991. When the discrepancy was called to his attention, he testified, ''This is all off of memory, it's all I can do.'' (Tr. 127.)

previously noted Wheelock owns a 10-acre farm. His most consistent crop has been apples grown on about 3-1/2 acres. By 1994, Wheelock had hired a person to prune the trees, to irrigate, and to otherwise look after the orchard. The actual harvest of the apples is performed by migrant workers. It is unclear whether this hired hand and the person who rented a portion of Wheelock's farm are one and the same.

In any event, Wheelock also planted potatoes and sweet corn, both of which, like the apples are harvested in the fall. The work required for the farm varies by the season with more required in the spring and fall, and less required in the winter and summer.[3] Whatever season, given the relatively small size of the farm and the fact that Wheelock hired others to do some of the work, Wheelock testified that he was not precluded from seeking full-time work when he didn't have any nor was he precluded from performing full-time work when he had it.[4] The farm's profit and loss is reported appropriately on Wheelock's income tax return.

B. *Analysis and Conclusions*

1. Legal principles

I begin with some basic principles of applicable law. As held in *La Favorita, Inc.*, 313 NLRB 902 (1994), ''It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed. . . . and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct.'' In discharging its burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The Government need not find the exact amount due nor adopt a different and equally valid formula which may yield a different result. *Minette Mills*, 316 NLRB 1009 (1995).

Once the General Counsel has shown the gross backpay due in the specification, the employer bears the burden of establishing affirmative defenses which would mitigate its liability, including willful loss of earnings and interim earnings to be deducted from any backpay award. *La Favorita, Inc.*, supra; *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). Any uncertainties or ambiguities should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068, 1069 (1973).

A discriminatee must make reasonable efforts to secure interim employment in order to be entitled to backpay. The burden is on the Respondent to establish that the discriminatee failed to exercise reasonable diligence in searching for work—''[The Board] emphasizes that the standard is that of *reasonable* diligence, not the highest diligence, [and] that the sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period.'' See *Electrical Workers IBEW Local 3 (Fischbach & Moore)*, 315 NLRB 1266 (1995).

2. Wheelock's alleged failure to remain in the labor market and alleged failure to search diligently for employment

In this segment, Respondent contends in effect that Wheelock worked too long and too hard on his farm and in ''other employment'' to satisfy his obligation to mitigate damages. Little time need we spend on this argument. First, Respondent does not specify what ''other employment'' is being referred to. This may be a reference to Wheelock's occasional repair of motorcycles, either on his farm or while working at Ottem's. The record does not show how much time Wheelock spent repairing motorcycles for friends, but judging by his meager earnings, it can not reasonably be argued that motorcycle repair was an impediment to seeking employment.

As to Wheelock's work on the farm, this at least presents a colorable claim. It may be answered as follows: The duty of mitigation does not require a discriminatee to exhaust every possible potential employment opportunity. Only a ''reasonable'' effort is required. See, e.g., *Southern Silk Mills*, 116 NLRB 769, 773 (1956).

Based on the evidence in the record, I find that Respondent has not proven that Wheelock failed to remain in the labor market and failed to search diligently for employment. As noted above, Wheelock owned his farm since 1988, and there is no showing that the amount of farm-related work performed by Wheelock in 1991 and 1992 was any greater than the amount of farm-related work performed in prior years, when Wheelock was also employed full time at Respondent or elsewhere. Accordingly, I find no evidence to support Respondent's contention that Wheelock left the labor market to work on his farm.

Similarly, Respondent has also failed to show what more Wheelock would have done to search diligently for employment.[5] In this regard, I agree with the General Counsel's argument (Br. at 4) that Wheelock's diligent efforts are proven by the fact that he found several jobs during the backpay period from the various sources he used.

In sum, I find that registration with the state agency Job Services, periodic visits to that agency for job leads on the bulletin board (even though the usual procedure for job referrals was for the state agency to call the registrant when an appropriate position opened up), and, perusal of newspaper want-ads, and utilization of a word of mouth network con-

[3] For the years 1991 and 1992, Wheelock testified he performed farm-related work: first quarter about 20–30 hours per week; second quarter, same; third quarter, about 40 hours per week; and fourth quarter, about 15 hours per week. This estimate included such tasks as recordkeeping, efforts to sell crops, and related activities. (Tr. 135–137.)

[4] In 1993, while working at Carnation, Wheelock did not plant a crop of sweet corn.

[5] I do not understand Respondent to be arguing that Wheelock failed to find substantially equivalent employment; rather Respondent argues that Wheelock failed to search diligently for any employment. In any event, either argument lacks merit. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual's background and experience and the relevant job market. *NLRB v. Westin Hotel*, 798 F.2d 1126, 1130 (6th Cir. 1985). While it is true that a job as a busdriver is less skilled and lower paid than that of a mechanic, in the absence of evidence to show that Wheelock acted improperly, I find that he was entitled to lower his sights by seeking less remunerative work after he unsuccessfully attempted for a reasonable period of time to locate interim employment comparable to his improperly denied position. *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972).

stituted adequate diligence in the context of all the evidence produced in this case. See *Electrical Workers IBEW Local 3 (Fischbach & Moore)*, supra; *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966).[6]

3. Wheelock's alleged failure to report all his interim earnings

In *Paper Moon Milano*, 318 NLRB 962 (1995), the administrative law judge recited the proper legal standard:

> In *American Navigation Co.*, 268 NLRB 426 (1983), the Board determined that discriminatees would be denied backpay for all quarters in which it is found that they intentionally concealed employment or earnings from the Board. The Board stated (id. at 428): ''The remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings.'' In a footnote to this statement, the Board stated that it is confident that the administrative law judges were capable of distinguishing honest error from deceit.''

At pages 6-7 of his brief, Respondent makes several contentions in support of his general claim that Wheelock concealed interim earnings.

a. *Farm income*

Respondent never showed that Wheelock had net earnings from his farm operation. Only net earnings are considered to be interim earnings deductible from gross backpay. *Regional Import & Export Trucking Co.*, 318 NLRB 816 (1995). And even if Respondent had shown the farm had net earnings, Respondent has also failed to show why the net earnings would not be considered supplemental income which is income from a moonlighting job held by the discriminatee prior to the unlawful discharge. See *Birch Run Welding & Fabricating*, 286 NLRB 1316 (1987). Supplemental income is not considered to be interim earnings.

b. *Income from motorcycle repair*

Respondent argues that Wheelock had earned $300 to $400 per year fixing motorcycles. As a basis for this contention, Respondent directs my attention to Wheelock's testimony in the transcript (p. 80), to which I now turn:

> Q. MR. HOCHANADEL: Now, can you give us an estimate for, say, for instance, for the last four years of how much money you would have earned—you did earn as a motorcycle mechanic?
>
> A. Oh, probably 3 or $400.

At page 104 of the transcript, the same subject was revisited:

> Q. MR. HOCHANADEL: Now, apart from the $300 in private motorcycle repairs which you estimated your made over the past four years or so, did you have any other earnings during the backpay period from July of 1990 through September of 1994 which were not reported on any of your tax returns for those periods of time?
>
> A. MR. WHEELOCK: Not that I can remember.

Based on the two references to the transcript, I conclude that Respondent is in error when he argues that Wheelock earned $300 to $400 per year. Instead, the $300 to $400 is over 4 years' time. To the extent there is ambiguity or uncertainty in the evidence, and I don't find any, these doubts are resolved against Respondent the wrongdoer, because an offending respondent is not allowed to profit from any uncertainty caused by its discrimination. *Minette Mills*, supra at 1011.

Moreover, I find that these earnings constitute supplemental income and were properly considered by the General Counsel in the amendment to compliance specification, appendix B, footnote 3. (G.C. Exh. 1(i).) In sum, I find that Respondent has failed to prove that Wheelock willfully failed to report any earnings from motorcycle repair as interim earnings. See *Arthur Young & Co.*, 304 NLRB 178 (1991).

c. *Part-time earnings at Ottems*

As noted in the facts, footnote 2, there is a discrepancy in the dates as to when Wheelock worked at Ottems, but not as to the amount he was making, $42.50 per week. To attempt to clarify this matter further, I turn back to Wheelock's testimony in the transcript:

> Q. GENERAL COUNSEL: Now there's confusion about whether you worked from May 1, 91 to September the 1st, 92 right at Ottem's? You see that.
>
> A. Yes.
>
> Q. Where one could gather that's the time you worked there. But then when you look at Resp.'s 5, you could also conclude that you worked there from July the 1st, 1991 till September the 30th 1991. Do you see that?
>
> A. Yes.
>
> Q. Do you have a recollection today of when you worked at Ottem's, what year and for how long?
>
> A. I worked there part-time off and on and I can't remember the dates.
>
> Q. Well, we're talking about a period of a whole year.
>
> A. yeah.
>
> Q. From May the 1st, 1991, till September the 26th, 1991, is one period of time. But then when you go from September the 26th, '91, to September the 26th, '92, is a whole year. Take you time now and see if you can remember when you worked there.
>
> A. Well, I know for sure I worked there from the time I was fired as a bus driver until I was offered the job at Basin Frozen Foods.
>
> Q. And when were you fired as a bus driver?

[6] Respondent's reliance on two cases, *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420 (1st Cir. 1968), and *NLRB v. Pugh & Barr, Inc.*, 207 F.2d 409 (4th Cir. 1953), is misplaced. First, both cases reversed the Board on the issue of a diligent job search. Since I am bound by decisions of the Board, even where reversed by a court of appeals, see *Iowa Beef Packers*, 144 NLRB 615, 616–617 (1963), these cases do not constitute binding precedent. In any event, they may both be distinguished on their facts. The discriminatees in the cited cases apparently only registered with the state unemployment offices, while in the instant case, Wheelock did that and more and unlike the discriminatees in the cited cases, was somewhat successful for his efforts.

A. March of '92?

Q. Well—

A. I think that's when it was. It's been three years. I can't remember for sure. I think it was about March of '92.

Q. Okay. And do we have any other records, do you know of any other records that would show when you went to work and when you stopped working at Ottem's?

A. I don't know, just my W-2's and——

(Tr. 127–28.)

All of this is important because in the amendment to compliance specification (G.C. Exh. 1(i)), appendix B, there is no allowance for interim earnings at Ottem's until the second quarter of 1992. In the application for employment (R. Exh. 4) where Wheelock stated he started at Ottem's on May 1, 1991, the document is dated September 28, 1992. And in the Claimant Expense & Search for Work Report (R. Exh. 5) where Wheelock stated he started at Ottem's on July 1, 1991, the document's date is not readable, but it was submitted shortly after September 30, 1991.

Based on this evidence and keeping in mind that employees are not disqualified for backpay merely because of poor recordkeeping or uncertainty as to memory. See *Hickory's Rest*, 267 NLRB 1274, 1276 (1983); *Diversified Case Co.*, 272 NLRB 1099 (1984), and also keeping in mind that the Respondent must not profit from ambiguity in the record, I make the following findings. I will credit Wheelock's written statement to the Board (R. Exh. 5) and find interim earning of $42.50 per week times 12 weeks for the third quarter of 1991. Thus, with gross of $3345 less interim of $2327 (original figure) increased by $510 equals new interim of $2837 and a new net of $508 for third quarter of 1991.

d. *Mileage deduction for SRTC job (second quarter 1994)*

In driving to the 32-day job at SRTC, Wheelock deducted mileage of 156 miles per day roundtrip. This figure should have been reduced by 24 miles per day as the amount of miles Wheelock would have had to drive from his farm to Respondent if he had never been fired. So the proper mileage figure is 132 miles per day rather than the 150 miles claimed by the General Counsel in footnote 9 of appendix B. Repeating the calculation recited in footnote 9, I take 132 miles per day roundtrip times .25 cents per mile. This yielded a $33 per day offset less Wheelock's $10 per day mileage allowance from SRTC. Accordingly $23 per day for 32 days ($736) should be deducted from SRTC interim earnings of $2811 as an allowable expense to give a net interim figure of $2075. This changes the net quarterly backpay figure to $2617 ($159 net savings in backpay).

4. Wheelock's termination from two interim jobs

As noted in the facts, Wheelock was fired from his jobs at the Moses Lake School District (March 1992) and at the Carnation Company (March 1994). At pages 7–8 of its brief, Respondent contends that these facts, ''precludes him from recovering from the employer.''

In *Ryder System*, 302 NLRB 608, 610 (1991), enfd. 983 F.2d 705 (6th Cir. 1993), the Board stated that discharge from interim employment, without more, is not enough to constitute willful loss of employment. (Citation omitted.) Rather the Board said, ''A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment.'' By this standard, I find that Respondent has failed to make the necessary showing.

As to the schoolbus driver job, Wheelock was terminated based on the allegations of one or more children. He denied the allegations at hearing and absent additional proof, I am unable to determine whether or not he actually committed the acts in question.

Wheelock's loss of his job at Carnation under the circumstances recited in the facts presents a much closer question. But here again, I note that Wheelock was promoted to a job as mechanic just 2 months after being hired as a trimmer, and his pay increased from $6.80 per hour to $10.50 per hour. There was no evidence relating to the facts and circumstances of Wheelock's discharge other than what he himself testified to. Therefore, I will first recite Wheelock's relevant testimony on direct examination:

Q. I see. So you got discharged at Carnation for what reason again?

A. For—well, they had three instances in there, and two of them were with the lock-out tag-out procedures, and one of them was a bearing failed that I had inspected.

Q. So you got discharged.

A. Yes.

Q. And what was the reason for your discharge?

A. Failing to use the lock-out tag-out procedures and not inspecting a bearing.

Q. Well, what happened? Why did you not use the lock-out procedures?

A. I just—the thing was clear across—the switch thing was clear across the yard, and there was a switch right beside the machine I was operating, and it was during shutdown, so I just turned it off and repaired the machinery.

Q. What is it? A double switch and you just turned this one off?

A. Yes.

Q. Okay. Let's call that Switch 1, Switch 1 being the closest to you.

A. Yeah.

Q. Switch 2 being across the football field, or whatever.

A. Yeah.

Q. If Switch 1 is off, can you turn the machine on with Switch 2?

A. No.

Q. So you had the thing under total control at the Switch 1, in close proximity to where you were working—

A. Yes.

Q. —and you turn it off.

A. All Switch 2 is is a circuit breaker.

Q. Okay. So that if Switch 2 is on—or off, Switch 1 won't work.

A. Yeah. Yes.

Q. But if Switch 2 is on, Switch 1 will work to turn it off and on.
A. Yes.

(Tr. 98–99.)

And on cross-examination:

Q. You worked at Carnation for about two years.
A. No, about a year.
Q. About one year. Okay. You're right. So in February of '94, you were terminated from Carnation for violating some safety rules?
A. Yes.
Q. And where were you supposed to put this padlock? On the circuit breaker or on the switch?
A. On the circuit breaker.
Q. Okay. And this was so the machine wouldn't be turned on while somebody is working on it?
A. Yeah, so the line going to the machine couldn't be activated.
Q. And were you working there alone or were others also working there?
A. What do you mean?
Q. Well, were there other mechanics working in the same area?
A. On the two that—on those two, no, they weren't.
Q. You were working alone.
A. Yes.
Q. And so you figured you turned the switch off and that was good enough.
A. Yeah, I turned it off where I was working. The switch was right where I was working.
Q. You didn't go over and turn off the circuit breaker.
A. I flat forgot it.
Q. And that happened on two occasions?
A. Yes.
Q. And you were warned once.
A. Yes.
Q. And then the second time you were terminated.
A. Pretty much, yeah.
Q. Well, do you want to add to that?
A. Well, the—I forgot a bearing, forgot to check a bearing.
Q. Okay. You were supposed to inspect a bearing?
A. Yeah.
Q. And you didn't do it?
A. I did, but it was good when I left.
Q. Then it failed shortly after that?
A. Yes, it did.
Q. How soon after that?
A. They said half an hour after the start of the next shift.

(Tr. 118–119.)

In reviewing this testimony line by line, it appears Wheelock has been forthright in his testimony. I also find that Wheelock's termination does not equal or exceed the Board's standard for willful loss of earnings. He committed no offense involving moral turpitude and his conduct was not otherwise so outrageous as to suggest deliberate courting of discharge. *Ryder System*, supra. According to Wheelock's testimony, his failure to lock the circuit breaker did not place him or anyone else in immediate jeopardy. Second, while he was warned once, there is no evidence that he was told that he faced discharge for a second transgression. As to the failed bearing, this seems like an event that would happen to anyone, even the most experienced and careful mechanic. Moreover, the Board has held that a discharge based on work performance does not constitute willful loss of earnings. *Arthur Young & Co.*, supra at 180–181. For the reasons stated, I find that Respondent has failed to meet its burden of proof with respect to this contention. See *P*I*E Nationwide*, 297 NLRB 454 (1989), enfd. in pertinent part 923 F.2d 506 (7th Cir. 1991).

5. Was employee Warren properly included and employee Washburn properly excluded in the General Counsel's calculations

In this segment, Respondent challenges the decision of Board Agent James Kobe, witness for the General Counsel, and Board Attorney James Sand, who did not testify, to include and exclude certain individuals.

Before deciding this issue, certain background will be helpful.

a. *Background*

In August, Kobe and Sand went to Respondent's place of business, and for a period of 2 days examined payroll records and personnel files, and consulted with Weber and his attorney as to which employees should be included and which excluded in the comparable employee formula utilized in this case. Apparently due to a misunderstanding, a long-term employee and apparent supervisor named Jim Lucas was absent. Lucas was believed to have a knowledge of employee classifications which in some cases was greater than company records which Kobe described as inconsistent and disorganized. In the absence of Lucas,[7] Kobe and Sand performed their job as well as they could, given the condition of company records.

The Board agents then compiled a list of mechanics and their pay rates for the relevant backpay period. Some employees were classified in company records as mechanics but did primary refrigeration or fabrication work. In some cases, Weber objected that a certain employee tentatively selected as a comparable should be excluded because of a demonstrably higher wage rate for long period of time. Where this could be shown, the employee was excluded so as not to skew the comparable wage rate. Kobe testified that ultimately the Board agents computed a median figure rather than an average, because the median was more fair to both sides.

b. *Warren*

Neither Warren nor Washburn testified. However, according to Weber, Warren was hired as an electrician[8] and was

[7] The two Board employees declined Weber's offer to contact Lucas by telephone in another state and make him available for a telephone interview.

[8] According to Warren's application for employment, dated April 4, 1990, he applied for a position in ''maintenance,'' and he possessed experience as a ''maintenance electrician.'' Warren also wrote

Continued

paid more than a mechanic. Subsequently, electricians and mechanics began to be used interchangeably with apparently some cross-training involved. The question came up whether, had Wheelock not been fired by Respondent, would Wheelock have qualified as an electrician. Weber responded, ''As far as the electrician, I don't believe so. He, you know, was mechanically inclined, moving parts. That's what he did all of his life, working on motorbikes, and that's moving parts, not electrical.'' (Tr. 146.) I reject this testimony of Weber and find under Board law, Wheelock is entitled to the benefit of the doubt that he would have qualified for electrical work with higher pay and therefore Warren was properly included in the calculation.[9]

I further credit Kobe's testimony that for most, but not all quarters, Warren's wages were around the median for and consistent with mechanics' wages.[10] In the third quarter, 1990, however, Warren was the highest paid employee (wages $4847, next to employee Child—$4115, next to employee Washburn $3904).

Finally, I also credit Kobe's testimony that when he and Sand were on Respondent's premises and reviewing records, neither Weber nor anyone else protested that Warren should not be included.

Based on the discussion above, I conclude that Warren was properly included in Kobe's and Sand's calculations because the evidence shows he was a comparable employee.[11]

c. *Washburn*

Washburn was included in the calculation for all relevant quarters except for one, first quarter, 1992. Respondent challenges this single quarter exclusion. According to Kobe, Washburn was excluded for the quarter in question because his earnings were ''anomalous,'' that is, a comparison of his earnings for the quarter with those earned by other comparable employees in the group shows Washburn's were far below what other people earned.

In attempting to explain the anomaly, Kobe testified that Washburn was terminated on July 21, 1991, and then rehired sometime in the first quarter of 1992, but the exact date could not be ascertained from company records.[12] Respondent's attorney reported Washburn's earnings for the first quarter of 1992 as $2,957.82. (Tr. 38–40.)

I accept and credit Kobe's testimony and find Respondent has the burden of showing why the decision as to Washburn and Warren were improper and Respondent has failed to do so. Accordingly, I reject Respondent's contention as to both Warren and Washburn.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Basin Frozen Foods, Inc., Warden, Wyoming, its officers, agents, successors, and assigns, shall pay to Earl Lee Wheelock the sum of $20,449, the backpay provided, with interest thereon to be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). There shall be deducted from the amounts due any tax withholding required by law.

APPENDIX

SUMMARY OF QUARTERLY INTERIM AND NET BACKPAY COMPUTATIONS

Quarter	GROSS	INTERIM	*Net*
3-90	$4,115	$2,574	$1,541
4-90	3,647	2,888	759
1-91	4,441	2,327	2,114
2-91	4,427	2,327	2,100
3-91	3,345	2,837	508
4-91	4,826	2,327	2,499
1-92	3,736	2,546	1,190
2-92	3,798	1253	2,545
3-92	4,497	1253	3,244
4-92	4,243	2911	1,332
1-93	3,742	3,951	0000
2-93	4,230	7,252	0000
3-93	4,862	7,252	0000
4-93	[3]34,543	7,252	0000
1-94	4,682	6,048	0000
2-94	4,692	2,075	2,617
3-94	4,032	5,341	0000
Total			$20,449

[3] For the fourth quarter, 1993, the original gross backpay figure was $3669. Then in the amendment to compliance specification, it was changed to $34,543 without explanation. This appears to be an error.

that he had experience working as an electrician in a mine in Nevada. (R. Exh. 1.)

[9] I note in Wheelock's application for employment, dated September 28, 1992, Wheelock listed position desired ''Mechanic'' with experience as ''welder'' (R. Exh. 4).

[10] Kobe gave names of other employees who he said were undisputedly mechanics, Washburn, Phillips, and Sullivan and whose wages were consistent with Warren's. Another person named Lang Weber was a highly paid specialist doing fabricating and special projects and Kobe agreed to exclude him.

[11] In light of this conclusion, it is unnecessary to comment on Respondent's alleged new calculations without Warren. (Br. at 8.) In passing, I do observe that Respondent has made no showing as to how he arrived at the figures recited in his brief.

[12] Kobe also described a policy to exclude any employee from the calculations when it couldn't be known for certain if the employee was a mechanic for the entire quarter. (Tr. 41.)

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.